EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE DISTRICT COURT
AT NAPIER

CRI-2015-041-000863
[2016] NZDC 4429

THE QUEEN

v

RONALD BELL

Date of Ruling: 11 March 2016

Appearances: J Reilly for the Crown
S Jefferson for the Defendant

Judgment: 11 March 2016

RULING OF JUDGE G A REA

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[1] There are two live applications before me at the present time. The Crown seeks to have the evidence of a witness, Samantha Hurst, given by the playing of DVD interviews that she conducted with the police as her evidence-in-chief and to have her electronically connected to the courtroom but out of Court for any additional questioning, including cross-examination.

[2] Mr Jefferson, on behalf of the defendant, does not object to the latter part of that request. He is happy for the complainant to give her evidence out of Court and by way of closed circuit television but Mr Jefferson submits that that should apply to all of her evidence and that the pre-recorded DVDs should not be played.

[3] In this case there were two separate interviews with Ms Hurst, both conducted by Detective Judith Hill. As I understand it Mr Jefferson does not dispute Detective Hill's experience and qualifications in carrying out such interviews and for

the purposes of this hearing it is most certainly a matter of judicial notice that the Detective regularly undertakes such roles in very sensitive cases that come before the Court. It is clear from the material before me that the complainant understood fully what she was being interviewed about and that the allegations that she outlined and the evidence that she could give identified the defendant as the offender. This method of recording evidence and subsequently playing it to the Court is one that is authorised under the Act.

[4] Mr Jefferson submits that in the circumstances of this case, because of inconsistencies between the two recordings, that it would be unfair to Mr Bell for those recordings to be played. The position of the complainant also has to be taken into account. She is a person who has her own difficulties. It is not necessary for the purpose of this decision to go into them in any detail but the nature of the charge against Mr Bell as it affects the complainant speaks volumes for that. Undoubtedly giving evidence by any form will be a traumatic experience for her even if she is not in the courtroom.

[5] The whole purpose of the legislation was to take as much stress out of the evidence process as possible and to provide a forum whereby complainants and any other witnesses who qualify under the legislation can give their evidence in as stress-free environment as the Court can provide. Obviously there is an overriding need to ensure that by complying with the legislation unfairness does not result to Mr Bell.

[6] It is extremely difficult in the circumstances of this case to see why there is any particular prejudice to him by the evidence being given in that way that outweighs what could be considered the normal way of dealing with these matters when such evidence is available. The sort of issues that Mr Jefferson raised, of inconsistencies or forgetfulness or any other concerns that there might be around the witness and her evidence, can be addressed by Mr Jefferson in cross-examination. That will be done essentially in a live way with the complainant out of the room but being shown to the jury by closed circuit television and in my view there is no undue unfairness to Mr Bell that does not exist in all other cases of a similar nature.

[7] In my view the Crown application is well founded. The complainant will be able to give her evidence-in-chief by way of the DVDs that have been already taken and the balance of her evidence, that is any additional evidence-in-chief, cross-examination, re-examination and questions from the Bench, will be dealt with by closed circuit television.

[8] There is a second application before the Court relating to the proposed evidence of Natasha Richards. Ms Richards is relevant in the context of these proceedings in that she is both a complainant as to what she says happened to her at the hands of the defendant and also a witness as to what she observed the defendant doing to others. Ms Richards died on [date deleted] 2015 aged 23 years. Previously she had given a DVD interview to a specialist interviewer and the Crown has applied under the hearsay provisions of the Evidence Act 2006 to have that DVD played to the jury.

[9] In determining whether the DVD should be played it is necessary to consider s 18 Evidence Act which deals with the general admissibility of hearsay. This section provides that a hearsay statement is admissible in any proceedings if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and either the maker is unavailable as a witness or there is undue expense in having the witness come to Court.

[10] In this case there is no dispute that the witness is unavailable because she has died and that the primary focus needs to be on the circumstances relating to the statement and whether they provide reasonable assurance that the statement is reliable. In considering that under s 16 of the Act I am to take into account the nature of the statement, its contents, the circumstances that relate to the making of it and any circumstances that relate to the veracity of the person involved, namely Ms Richards, and any circumstances that relate to the accuracy of the observations of the person interviewed.

[11] In this case the nature of the statement deals with the allegations that I have already outlined. Ms Richards knew at the time she was interviewed that she was making a statement about alleged sexual misconduct by the defendant, both as it

affected her and at least one other person that she was able to comment on. The contents of the statement that she made dealt with that very issue and the circumstances relating to the making of it were for the purposes of providing the police with evidence to take action against the defendant should that be the appropriate course.

[12] Mr Jefferson has some concerns about the veracity of Ms Richards. He has advised that he is aware that she has previous appearances before the Court and it is my understanding that the Crown will make available to him a list of her previous convictions prior to trial.

[13] It is also necessary, even if on the analysis of ss 18 and 16 Evidence Act the hearsay should be admitted, that the general exclusions under s 8 need to be considered. In any proceeding a Judge is required to exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial affect on the proceeding or needlessly prolong it. In determining whether the probative value of the evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect the Judge must take into account the right of the defendant to offer an effective defence.

[14] It is accepted that the following things need to be satisfied for the statement to be admitted. These flow from the decision of Lang J in *Bishop v Police* [2008] 20080228. That decision has been upheld on a number of occasions, both at High Court and Court of Appeal level and seems to be the template that is used in determining whether the evidence is admissible in any given case.

[15] The first thing is that the notice of requirements under s 22 have been met. There is no issue about that in this case. Secondly, the circumstances relating to the statement provide reasonable assurance that the statement is true. In this case the interviewer is very experienced and was conducting the interview with a view to obtaining information about the complaint that the witness had made and what she could say about what happened to another or others. The maker of the statement is unavailable. That has to be accepted in this case and that the probative value of the

statement is not to be outweighed by the risk that the statement will have an unfairly prejudicial effect.

[16] In considering the reliability of a hearsay statement the Court of Appeal has observed in *Adams v R* [2012] NZCA 386 that s 18(1)(a) focuses on the circumstances that provide reasonable assurance that the statement is reliable. That is a threshold test. A Judge must determine as a matter of law whether the threshold is met. The gatekeeping role is quite different from the jury's role in assessing the credibility of the witness and the reliability of the evidence given at trial. The distinct constitutional functions of Judge and jury must not be conflated.

[17] I have to say in cases such as this, and this may well be one of them, it is often the case that a Judge is asked not to look at the threshold question that the Court of Appeal identified in *Adams*, but to essentially adopt the role of the jury and determine the reliability and credibility of the evidence that the proposed hearsay represents. In this case, in my view, the threshold has been clearly met.

[18] This is an experienced interviewer who has interviewed the complainant knowing what it is she is being interviewed about, the seriousness of the allegation, the context in which the interview is being held and what the interview will be used for. I am quite satisfied that it can be regarded as reliable. The witness is not available and therefore the evidence can be given.

[19] I am mindful of the submissions made by Mr Jefferson about the prejudice to the defendant. Obviously there will always be prejudice to a defendant to some degree when a hearsay application is successful. By its very nature the success of the application means that the witness is not available for cross-examination in the normal way. Clearly the legislature took that very much into account in passing the legislation otherwise it would not be here. It is a factor that arises in every such case that where the hearsay statement is admitted the defence do not have the opportunity of cross-examining. From time to time as well that may well mean that the defendant has to give evidence on some aspects of what has been said. Obviously once in the witness box questions on all relevant topics can be asked of him but that has to be weighed up as well with the Crown's right and the deceased complainant's

right to have the case heard in full based on the evidence that would otherwise be admissible.

[20] In this case the prejudice to Mr Bell, in my view, does not go any higher than the inherent difficulties that counsel will face in any case where there is a successful hearsay application. On that basis I consider that the Crown has established its case under s 22 and the evidence will be admitted at trial.

G A Rea
District Court Judge